



## STATE OF WISCONSIN Division of Hearings and Appeals

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In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████ Respondent

DECISION

Case #: FOF - 175694

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Pursuant to petition filed July 21, 2016, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on Monday, September 19, 2016 at 10:30 AM at , Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

Office of the Inspector General  
Department of Health Services - OIG  
PO Box 309  
Madison, WI 53701

Respondent:

██████████  
████████████████████  
████████████████████

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**ADMINISTRATIVE LAW JUDGE:**

Michael D. O'Brien  
Division of Hearings and Appeals

### **FINDINGS OF FACT**

1. The respondent (CARES ██████████) is a resident of Missouri who received FS benefits through Milwaukee County from October 1, 2013, through July 31, 2014.
2. The respondent lived in Wisconsin when she applied for FoodShare. She moved to Missouri soon after being found eligible in that state but continued to receive benefits through the State of Wisconsin.
3. The respondent did not receive FoodShare benefits from two states at one time.

4. On August 2, 2016, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent received FS through the State of Wisconsin while living in Missouri.
5. The respondent failed to appear for the scheduled September 19, 2016, Intentional Program Violation (IPV) hearing and did not provide any good cause for her failure to appear.

## DISCUSSION

FoodShare recipients lose their eligibility if the department proves by clear and convincing evidence that they intentionally violated the program's rules; the penalty for the first violation is one year. 7 CFR §§ 273.16(e)(6) and (b)(1)(i). The department seeks to disqualify the respondent for one year because it contends that she did not report that moved to Missouri soon after applying for benefits in Wisconsin.

FoodShare residency requirements are not strict. States cannot impose durational requirements or require a household to live in a permanent dwelling, have a fixed address, or intend to remain in the state. But federal regulations state that a "household shall live in the State in which it files an application for participation." 7 CFR § 273.3(a). There is no regulation that specifically requires a person to report a change in address before she renews her application. This makes sense because FoodShare benefits, unlike medical assistance rules, are mostly uniform from state to state. The administrative code does reflect a concern that a person not receive benefits from two states at once, but this did not occur here. *See* 7 CFR § 273.3(b).

Clear and convincing is a middle level of proof that requires the Department to show that more than just a preponderance of the evidence supports its position but does not require it to eliminate all reasonable doubt, as it would have to in a criminal case:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

*Kuehn v. Kuehn*, 11 Wis.2d 15, 26 (1959)*Kuehn*, 11 Wis.2d at 26.

*Wisconsin Jury Instruction – Civil 205* explains that this level of evidence must clearly have more convincing power than the opposing evidence, but it does not require absolute certainty:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

The *McCormick* treatise suggests that the standard "could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable." 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4<sup>th</sup> ed. 1992). Thus, to find that the respondent intentionally violated the FoodShare program's rules, the evidence must induce a firm conviction that she attempted to purchase FoodShare benefits and that she did so intentionally, although there may be a reasonable doubt that this is true. Intent is a subjective state of mind determined upon all of the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81

Wis.2d 183 (1977). A person is presumed to know and intend the probable and natural consequences of his actions

The respondent applied for FoodShare while living in Wisconsin but moved to Missouri almost immediately. She used all of benefits in Missouri and never reported that she had left Wisconsin. But she did not reapply for benefits in Wisconsin when her renewal was due. Based upon this, I find no rule that she clearly and convincingly violated. Therefore, the department's finding is not sustained.

### **CONCLUSIONS OF LAW**

For the reasons discussed above, there is no clear and convincing evidence that the respondent intended to commit an IPV.

**NOW, THEREFORE, it is ORDERED**

That the petitioner's determination of an intentional program violation is reversed, and the petition for review is hereby dismissed.

### **REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR**

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

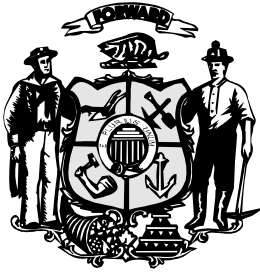
Given under my hand at the City of Madison,  
Wisconsin, this 29th day of September, 2016

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\sMichael D. O'Brien  
Administrative Law Judge  
Division of Hearings and Appeals

c: Office of the Inspector General - email  
Public Assistance Collection Unit - email  
Division of Health Care Access and Accountability - email  
[REDACTED] - email





## **State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on September 29, 2016.

Office of the Inspector General  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability

